No. 17745

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD LEE DEBARDELEBEN and LUEVOIRN HENDRIX,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

I.
Statement of Jurisdiction.

Each appellant was adjudged guilty by the United States District Court for the Southern District of California of (1) illegally importing heroin (2) concealing and facilitating the concealment and transportation of the same heroin, both in violation of Title 21, United States Code, Sections 173 and 174 (3) illegally importing marihuana (4) concealing and facilitating the concealment and transportation of the same marihuana, both in violation of Title 21, United States Code, Section 176(a).

The offenses occurred in San Diego County, in the Southern Division of the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231.

This Court has jurisdiction to entertain this appeal from the judgment under Sections 1291 and 1294 of Title 28, United States Code.

II.
Statement of the Case.

Appellants, together with Gloria Ellis and Winston Brother Peters, were each charged in the first four counts of a five count indictment, returned on May 10, 1961, with illegally importing, concealing and facilitating the concealment and transportation of heroin and marihuana. Count One charged illegal importation of three ounces of heroin into the United States from Mexico by the four defendants. Count Two charged the four defendants with concealment and facilitation of concealment and transportation of three ounces of heroin knowing of the allegal importation. Count Three charged the four defendants with smuggling two marihuana cigarettes into the United States from Mexico and Count Four charged the four with concealing and facilitating the concealment and transportation of two marihuana cigarettes knowing they had been illegally imported into the United States from Mexico. Peters alone was charged in Count Five with failing to register as a convicted marihuana law violator when leaving the United States in violation of Title 18, United States Code, Section 1407.

Appellants and Peters entered pleas of not guilty to the first four counts and the matter proceeded to trial

by the court on August 29, 1961, the defendants having waived jury pursuant to the provisions of Rule 23(a) of the Federal Rules of Criminal Procedure. [R. T. 2-4.]* Gloria Ellis pleaded guilty to the first four counts prior to the trial of the other three defendants. [R. T. 2.]

On August 30, 1961, the Court found appellants and Peters guilty of all four counts and sentenced them. [R. T. 241, 255.] A timely notice of appeal was filed by appellants.

III.
Specification of Errors.

Appellants have specified the following points on appeal:

1. The trial court committed error by not considering the testimony of Gloria Ellis, a co-defendant, put on by the Government, and who was impeached by prior inconsistent statements after the Government was surprised by her testimony.

2. The evidence was insufficient to convict the appellants.

3. The trial court committed error by interrupting the trial of appellants for the purpose of receiving evidence and sentencing a co-defendant who had pleaded guilty.

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*R. T. refers to Reporter's Transcript of Proceedings.

IV.
Statement of the Facts.

At approximately 8:20 P.M. on the evening of April 18, 1961, a 1959 Ford Thunderbird automobile with four occupants entered the United States at San Ysidro, California, from Mexico. [R. T. 9.] The owner of the vehicle, appellant Debardeleben [R. T. 50], was in the back seat of the car, directly behind Gloria Ellis who was in the front passenger seat. Appellant Hendrix was driving and Peters was seated directly behind the driver. [R. T. 10, 21.]

Immigration Inspector Robert J. Herrenbruck asked each of the four occupants, in each other's presence, whether they had brought in anything from Mexico. They each replied no. Hendrix told Herrenbruck, in the presence of the four, that they had been in Mexico for about three hours and that they were "justing taking a ride". [R. T. 11.]

Hendrix, at the direction of Inspector Herrenbruck, drove the vehicle to the secondary inspection area where the four were questioned by Customs Inspector Charles E. Trumble. Inspector Trumble asked each of the occupants, in the presence of one another, whether they were bringing any merchandise from Mexico. Each answered no. Then Trumble asked the occupants of the vehicle the purpose of their trip to Mexico. Hendrix answered for the four by saying they had gone to Mexico for a short vacation. [R. T. 22.]

Following this conversation, Mr. Trumble requested Hendrix to open the trunk and became suspicious when Hendrix acted nervously and his hand shook when he opened the trunk of the vehicle. [R. T. 30.]

There followed a personal search of the appellants Debardeleben and Hendrix and Peters, by Inspector Trumble. Gloria Ellis was seated in the Customs Office while Trumble and Chief Inspector Anderson took the three male passengers into the search room one at a time. During the course of the search, Trumble asked the three males, out of the presence of each other, whether they had been with Gloria Ellis during the entire time they were in Mexico. They each stated definitely that they were and they had not been separated from Gloria Ellis at any time. [R. T. 23, 31.]

After the search of the male passengers, Customs Inspectress Annetta W. Lohman made a person search of Gloria Ellis and in her underclothing she found two marihuana cigarettes and three rubber contraceptives, each containing heroin. [R. T. 22, 32, 33, 36.]

Later in the evening, Debardeleben was interviewed by Customs Agent Fred Parkerson. Debardeleben stated that he had left his home in Compton, California between 12:30 and 1:00 o'clock on the afternoon of April 18th; that he drove his Ford Thunderbird to various places in Los Angeles for automotive service; that he then drove to Wilmington and Imperial Avenues in Los Angeles where he picked up Peters; that after driving around awhile Debardeleben went to Hendrix's house and picked him up; that from there Debardeleben went to the house of his girl friend, Gloria Ellis; that after being there for a few minutes, left for a ride in Los Angeles just to "blow the car out"; that they then proceeded to the Santa Ana Freeway, then directly to San Diego, and from there on to Tijuana. [R. T. 49, 50.]

Debardeleben's testimony at the time of trial was inconsistent with his statements of April 18, 1962. Instead of leaving his girl friend's house for a ride in Los Angeles and then on to Mexico as he had told Agent Parkerson on April 18, he testified that he went to her house and before they left her house, she asked him to go to Tijuana and he assented. [R. T. 160.] He specifically denied telling anyone that he had been with Gloria Ellis during the entire visit to Mexico. [R. T. 164.]

Debardeleben testified he had known Gloria Ellis for almost a year before the trip to Tijuana; had been "fooling around" with her; saw her constantly during the month preceeding the trip to Tijuana; and had been with her the night before the trip. [R. T. 169, 170.]

Debardeleben testified he had known Peters for two years and had seen him the day before the trip. He testified he had known Hendrix for three years and had seen him a day or two before the trip. [R. T. 169, 170.]

As far as pertinent herein, Debardeleben testified that before each of the passengers met on the 18th, none of them had planned to meet one another on that day; that the trip to Tijuana was entirely spontaneous; that even after he had decided to go to Tijuana at the request of Gloria Ellis, he never told Hendrix they were going to Mexico nor asked Hendrix if the wanted to go; that although his newly purchased Thunderbird was leaking transmission fluid, he had no objection to letting Peters or Hendrix drive the car from Los Angeles to Tijuana, Mexico and back, at the mere request of Gloria; that before getting on the freeway in

Los Angeles he stopped and Peters took the wheel; that he slept until they arrived in Tijuana around 6:00 P.M. when the other passengers left the car at a gasoline station; that he went back to sleep until Peters stopped at a restaurant; that he then went into a restaurant and ate with the other males for twenty to thirty minutes; that during this time Gloria Ellis was separated from them; that he again went to sleep and did not wake up until Hendrix, who was now driving, was returning to the border, at which time he requested Hendrix to stop so he could go to a restroom; and that he knew nothing of the narcotics found on Gloria Ellis' person. [R. T. 157-186.]

Following the interview of Debardeleben on the 18th, Parkerson interviewed Peters and then Hendrix. The original version of the trip given by Hendrix was that he was picked up by Debardeleben and Peters in Debardeleben's Thunderbird at his home in Los Angeles; that from there they went over to Gloria Ellis' house; that after being there for awhile they left with Debardeleben driving, then they proceeded to the Santa Ana Freeway and on to Tijuana; that he was asleep when they arrived in Tijuana and he woke up once in Tijuana when Gloria Ellis was out of the car; that the next time he woke up was near the Caliente Race Track where Peters had stopped the car beside the road; that he then got up, took the wheel and drove back towards the border, stopped at a 76 gasoline station where he purchased two dollars worth of gasoline, and then went to the border. [R. T. 54.]

At a second interview a few days later, Hendrix told substantially the same story as he had previously giv-

en. He stated that he had been picked up by Peters and Debardeleben at his house and from there they proceeded to Gloria Ellis' house; that from there they went for a ride over town and got on the freeway south and on to Tijuana; that they had stopped enroute at a drive-in where Peters took over the wheel from Debardeleben. [R. T. 55.]

Hendrix also testified in his own behalf inconsistently with his statements to the Customs officials. He did not remember whether or not he had told Inspector Trumble he had not been separated from Gloria Ellis during the trip to Mexico. [R. T. 150.] Instead of stopping for gasoline on the way to the border, after the trip to Mexico, as he first related to Parkerson, Hendrix testified that he had purchased the gasoline when the party first arrived in Tijuana. [R. T. 132.] Instead of being asleep with the exception of a time when Gloria Ellis was out of the car and when they were near the race track where he took over the wheel, he testified that the other males were in a restaurant for twenty or twenty-five minutes and Ellis was not with them. [R. T. 110, 111.] Instead of waking up near the race track, he testified that the party left the restaurant and Peters drove around town a little and then out to the race track where he was asked to drive. [R. T. 111.]

In direct contradiction with Mr. Trumble's testimony that Hendrix opened the trunk of the car, Hendrix testified that Trumble took the keys from the ignition of the car and opened the trunk himself. [R. T. 115.] He also denied telling Trumble the party had gone to Mexico for a short vacation. [R. T. 115, 116.] Hen-

drix also testified the party had made no arrangements to meet before the trip and that it was entirely spontaneous. Moreover, he never knew that the party was going to Tijuana until he crossed the border, and never asked anyone where they were going nor did anyone tell him. [R. T. 130, 131.] He stated he had known Peters, Ellis, and Debardeleben for two to three years, and the last time he had talked to either Debardeleben or Ellis was three weeks before the trip. [R. T. 120, 121.]

In effect, his testimony was that he was sitting at home watching television when Peters and Debardeleben arrived and asked if he would like to go for a ride; that he agreed and the three went over to Ellis' house and without inquiry he rode with them to Tijuana; that he first learned they were going to Tijuana when they crossed the border; that he purchased gasoline just after they arrived in Mexico; that the three males went to a restaurant while Gloria Ellis was absent for twenty or twenty-five minutes; that Peters drove the car around town for a while and then out to the race track where he took over the wheel; that he headed back towards the border, stopping at a service station at the request of Debardeleben.

Hendrix as well as Debardeleben repeatedly testified that Debardeleben was asleep almost the entire trip from Los Angeles to Mexico and while in Mexico. Significantly, on direct examination, Hendrix testified that when the party first stopped in Tijuana at a service station, he stayed at the vehicle and paid for the gasoline while Ellis and Peters went to a restroom and Debardeleben remained in the car. [R. T. 108, 109.] On

cross-examination on the first day of the trial, Hendrix testified that he paid for the gasoline because Debardeleben was asleep. [R. T. 132.] When cross-examination was resumed on the second day of the trial, Hendrix testified Debardeleben got out of the car when they first arrived in Tijuana. [R. T. 151.]

During its case in chief, the Government called Gloria Ellis as its witness. As her testimony progressed, the Government claimed surprise and asked leave of the Court to treat Ellis as a hostile witness. [R. T. 67.] Mr. Parkerson testified to prior statements made by the witness that were inconsistent with her testimony. His testimony was admitted solely for the purpose of laying a foundation for the claim of surprise, and the Court expressly ruled that it was not admissible against the defendants. [R. T. 69.] After successfully laying foundation for the claim of surprise, the Court granted the Government's request to examine Ellis as a hostile witness. [R. T. 74.] Thereafter Miss Ellis denied making the inconsistent statements and continued to testify in opposition to her prior statements made out of the presence of the defendants. [R. T. 74-80.]

Upon the completion of Ellis examination, the Court advised counsel for appellants that Parkerson's testimony concerning his interviews with Ellis had been admitted solely for the purpose of laying foundation for the claim of surprise and not as evidence against the appellants nor as evidence to impeach Ellis. The Court then inquired whether defense counsel would stipulate that the same testimony could be used for purpose of impeaching Ellis without the necessity of Parkerson re-

peating the testimony. All counsel so stipulated. The Court then admitted Parkerson's testimony for impeachment purposes only in connection with the testimony given by Ellis, an adverse witness. [R. T. 93-95.]

Mrs. Lohman was recalled as a witness to the prior inconsistent statements made by Ellis and again the Court received the testimony only for the purpose of impeaching the hostile witness Ellis. [R. T. 95.]

Before finally closing the case and after the Government offered no rebuttal, the Court announced it would continue the case until 1:30 in the afternoon at which time he desired to have Ellis present. [R. T. 188.] After the noon recess, the Court indicated in the presence of Ellis' counsel that he proposed to sentence her. Her counsel requested permission to examine Mr. Parkerson concerning her prior statements to him, and with the express ruling that the testimony would not be admissible against the defendants on trial, the Court permitted Ellis' counsel to examine Parkerson. [R. T. 193.] After repeatedly announcing to appellants' counsel that the testimony offered by Ellis' counsel was not evidence in the case on trial and would be considered only in connection with the sentencing of Gloria Ellis in her case, the Court advised appellants' counsel that they and appellants were free to leave the courtroom while he handled Ellis' case. [R. T. 193-196.] On at least three other occasions during the sentencing procedure of Gloria Ellis, the Court advised appellants' counsel that no part of the proceedings were admissible against appellants. [R. T. 206, 207, 223.]

Following the sentencing of Ellis, the Court asked her if she wanted to change her testimony to which she

replied no. Thereupon both sides rested. [R. T. 230, 231.]

After argument was heard on both sides, the Court found appellants guilty. The Court considered Ellis as an impeached witness, but did not consider the impeaching testimony as evidence against appellants. The Court did evaluate her testimony in reaching its finding. [R. T. 239-241.]

V.
Argument.

A. Court Did Consider Testimony of Ellis; Government Not Bound by Testimony of Hostile Witness.

Ellis was thoroughly impeached by properly admitted evidence as to her prior inconsistent statements. The testimony was admitted at first, for the purpose of laying a foundation to show a genuine claim of surprise and then, later, for the sole purpose of impeaching her as a hostile witness after a futile effort to elicit the truth from her.

This Court has fully adopted the recognized exception to the rule against impeaching one's own witness when there is a genuine claim of surprise.

Beiber v. United States, 276 F. 2d 709, 712 (9th Cir. 1960);

Stevens v. United States, 256 F. 2d 619, 622 (9th Cir. 1958);

Weaver v. United States, 216 F. 2d 23, 25 (9th Cir. 1954);

Gendelman v. United States, 191 F. 2d 993, 996 (9th Cir. 1951), Cert. Denied, 342 U. S. 909 (1952).

Appellants correctly state that the accepted rule is that evidence used to impeach is not substantive evidence because of the hearsay rule. See footnote 9 at page 623 of this Court's opinion in *Stevens, supra,* setting forth the arguments of Wigmore and McCormick in support of accepting such evidence as substantive evidence, and describing the modification of the rule when there is indication in the record that the recalcitrant witness "adopts" the prior statements. In the instant case, as in *Stevens,* the witness cannot be said to have adopted her earlier statements so as to invoke the modification of the rule.

While the Courts have heretofore found the hearsay rule controlling, the arguments of these text writers should be carefully considered. The object of all judicial inquiry is the ascertainment of the truth. It is patent from the record in this case, that Gloria Ellis' statements to Parkerson immediately after the incident contained the seeds of the truth, whereas her testimony on the stand was the fruit of a deliberate contrivance by Ellis and the appellants to conceal the truth from the trier of fact. Why shouldn't the trier of fact be permitted to subject prior inconsistent statements to the same test of credibility as any other evidence, and if it passes the test then accept it. Keeping in mind that the witness is available for cross-examination by the party against whom the statements are offered, doesn't the advantage of having available additional evidence to aid in the determination of the truth outweigh the possible dangers from its use.

By urging this Court to take the bold step of upsetting tradition, the Government is not conceding that

without the prior inconsistent statements there was not substantial evidence to support the conviction of appellants. On the contrary, the evidence shrieks the guilt of appellants notwithstanding its circumstantial nature.

Exception is taken to appellants' contention that the Government is bound by the testimony of Ellis, though impeached, so far as it is consistent with other phases of the case. What other phases of the case? The impeached testimony of the appellants? What appellants urge is that even if the Government's witness is properly impeached and shown to testify falsely, the same unbelievable testimony of defense witnesses destroys the Government's impeaching testimony though believed by the trier of fact. Two lies make the truth!

The correct statement of the rule is that the trier of fact can disbelieve any of an impeached witness' testimony except that which is corroborated. *Weaver v. United States, supra; United States v. Marks,* 274 F. 2d 15, 19 (7th Cir. 1959). Certainly other impeached testimony is not corroboration. The testimony of Ellis on direct and on cross-examination was received by the Court and after consideration rejected. [R. T. 241.] It was impeached and the trier of fact is the sole judge of the credibility of witnesses and the weight to be given to any witnesses testimony, if any at all, whether the trier of fact be Court or jury. *Henry v. United States,* 215 F. 2d 639 (9th Cir. 1954); *Pasadena Research Laboratories v. United States,* 169 F. 2d 375, 380 (9th Cir. 1948); Cert. Denied 335 U. S. 853 (1948). In the latter case, this Court stated:

> "To clarify the matter for once and for all, we wish to restate plainly that this court is not con-

cerned with the *weight* of testimony adduced below. 'Questions of credibility were for the trial court.' " (Citations omitted.)

It is plain that the Court did not base the conviction of appellants on evidence of the prior inconsistent statements of Ellis. The Court repeatedly stated it was not being received as substantive evidence against appellants. In pronouncing its finding, the Court expressly stated that it did not use this evidence in reaching its decision. [R. T. 239-241.] It is presumed that the trial judge considered only competent evidence in arriving at his judgment.

Benchwick v. United States, 297 F. 2d 330, 336 (9th Cir. 1961);

Pasadena Research Laboratories, supra, at p. 385;

Weaver v. United States, supra, at p. 25;

United States v. Morris, 269 F. 2d 100, 102 (2d Cir. 1959); cert. denied, 361 U. S. 885 (1959).

It is sufficiently clear that the Court rejected all of Ellis' testimony after considering it for its probative worth. If not, appellants' contention that they should know what was the position of the Court is answered by Rule 23(c) of the Federal Rules of Criminal Procedure. The rule provides only for a general finding absent a request for special findings. This record is barren of any such request on the part of appellants.

B. Evidence Amply Supports Trial Court's Finding of Guilt.

A conviction should be sustained on appeal if there is substantial evidence, taking the view most favorable to the Government to support it. In considering the facts the reviewing court must grant every reasonable intendment in favor of appellee.

> *United States v. Glasser,* 315 U. S. 60, 80 (1942);
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> *Arena v. United States,* 226 F. 2d 227, 229 (9th Cir. 1956), Cert. Denied, 350 U. S. 954 (1956).

Disregarding entirely any testimony of Gloria Ellis and any testimony concerning her prior inconsistent statements, the remaining circumstantial evidence amply supports the trial court's finding of guilt. Since the trial court rejected her testimony as being entirely false, the remaining evidence in the case can be treated as if she had never been called and no impeaching testimony came in.

A brief review of the evidence demonstrates that the appellants were engaged with Gloria Ellis in a common scheme and plan to illegally import the marihuana and heroin, and that they aided and abetted the importation of the marihuana and heroin.

Appellants and Gloria Ellis entered into the United States from Mexico and upon search of the person of Gloria Ellis the marihuana and heroin were found. There is no question that the heroin and marihuana were illegally imported. A federal crime had been made out. There is no problem of jurisdiction as was found

in *Hernandez v. United States,* 300 F. 2d 114 (9th Cir. 1962), cited by appellants. If appellants knew Gloria Ellis had the narcotics in her possession when she crossed the line, the knowledge of illegal importation was made out.

Did the appellants knowingly aid and abet Gloria Ellis in the illegal importation of the contraband? There is not the slightest doubt that each of the appellants aided and abetted Gloria Ellis in the commission of all of the four offenses upon which they were tried. Debardeleben furnished the automobile that carried Gloria across the line. Hendrix drove the automobile that carried Gloria across the line as well as supplied the gasoline. If they knew she was carrying the contraband when she entered the United States they each facilitated the concealment and transportation of the contraband by telling Inspector Hereenbruck that they had nothing to declare.

What substantial evidence is there to show that they each knew Gloria was carrying the contraband on her person? Consider first Debardeleben. Before the contraband was discovered, he told Inspector Trumble that he had been with Gloria the entire time he was in Mexico. If he was with her the entire time, he must have been with her when she acquired the narcotics and with her when she secreted them in her underclothing.

When first interviewed by Agent Parkerson he stated that after picking up Gloria they left for a ride around town. On the witness stand, he contradicted himself by saying that Gloria asked him to go to Tijuana before they left her house. During his first interview

he made no mention of being separated from Ellis, nor did he mention sleeping almost the entire trip. He found it necessary to deny telling Inspector Trumble that they had been together at all times during the trip to Mexico. It is obvious that the first story the appellants had contrived in the event they were stopped was to assert they had been together at all times. Once the contraband was discovered on Ellis then the story didn't sound too well so he fabricated another story. The conduct of the defendant on the witness stand in telling the improbable story that the trip was entirely spontaneous; that Hendrix wasn't told that they were going to Tijuana; that he would permit another person to drive his newly purchased automobile all the way from Los Angeles to Tijuana despite its leaky transmission, all showed a conciousness of guilt. The more reasonable inference is that because of his relationship with Ellis he was able to prevail upon her to "mule" the contraband across the border for him with the idea that perhaps a woman would be less likely to be searched.

It becomes even clearer when it is considered that Hendrix acted nervously and his hand shook when opening the trunk to the car. Surely Hendrix was aware of the contraband. Yet Debardeleben did not take pains to separate himself from Hendrix during the trip by his testimony.

Concerning Hendrix's knowledge, in addition to the inconsistent statements to Parkerson and those made at the trial, there is the fact that he acted nervously and his hand was visibly shaking when he opened the trunk of the vehicle for inspection. On the stand to avoid the consequences of this damaging evidence he

stated that the Inspector took the keys from the ignition and opened the trunk himself. He too stated when first interviewed before the contraband was found, that he had not been apart from Gloria Ellis while in Mexico. His desire to avoid any participation in the plan to go to Tijuana prompted him to relate the absurd story that he didn't realize he was going to Tijuana until he crossed the border. While Debardeleben testified he had spoken with Hendrix a day or two before the trip, Hendrix testified he hadn't seen Debardeleben for three weeks before the trip. It is no wonder that the Court disregarded his story completely as he had Debardeleben.

Taking all the above circumstances, it must be concluded that a reasonable minded trier of fact could find beyond a reasonable doubt that the appellants knowingly aided and abetted Ellis in bringing in the contraband.

The circumstances in this case are just as strong, if not stronger than the evidence that warranted affirmance in *Eason v. United States,* 281 F. 2d 818 (9th Cir. 1960). There the contraband was found secreted behind the dashboard of Eason's car and the two occupants of the car were both convicted of smuggling. No inconsistent statements were made there, but as here the occupants of the car acted nervously when questioned by the inspector. The defendants' explanation of the trip sounded more plausible than the one given by appellants here. They argued that the possession could have been in either of them, however this Court concluded that the evidence of close friendship, joint venture and general conduct was sufficient

for the jury to find that possession was jointly in the defendants.

Although appellants argue that there is no evidence from which the trial court could have concluded that there was a common scheme or plan, it is respectfully submitted that from all the circumstances, including the inconsistent statements, the Court could have concluded nothing else.

It was clearly a joint venture. Debardeleben furnished the car and the "mule," Hendrix did the driving across and purchased the gasoline. Appellants both stated when interviewed separately before the contraband was found that he had not been apart from Ellis. At the time of trial, both told the same story of being absent from the girl for twenty to twenty-five minutes in a restaurant. Could the trier of fact possibly conclude that both appellants had forgotten their trip to the restaurant when interviewed a short time afterwards and then at the time of trial months later both remember all the details of each other's activities. There were only two logical conclusions the trial court could have reached when considering the statements that each made about being with Gloria at all times. First, either they had not been apart and must have been with her when she obtained the heroin, or second, that they had agreed in advance to tell this to the inspectors should they be questioned.

C. There Was No Error in Suspending the Trial to Sentence a Co-Defendant.

Appellants here urge that the Court relied on the impeachment testimony to convict them. This contention has been answered previously in the discussion of

the first two specifications of error. To support their contentions appellants have extracted a portion of the Court's comments beginning on page 233 of the Reporter's Transcript. Immediately preceding the quoted remarks, the Court stated it could not consider the impeaching testimony. Later, the Court again stated he was not considering the impeaching testimony, and expressly found the circumstantial evidence to be enough without resort to the impeaching testimony. [R. T. 239-241.]

VI.
Conclusion.

For the foregoing reasons, it is respectfully submitted that the District Court's finding of guilt should be affirmed as to both appellants.

Respectfully submitted,

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